CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 186

MARION A. HART; FRANK C. HART, JR.; JAMES A. HART, an infant by Marion A. Hart, his Guardian; KERRY ANN HART, an infant by Marion A. Hart, her Guardian; and THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, as Depositary for Marion A. Hart, Frank C. Hart, Jr., James A. Hart and Kerry Ann Hart,

Petitioners,

against

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation of the State of New Jersey,

Respondent.

BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI

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APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO. 4-3033

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A

STATEMENT

General

The opinion of Judge Clark contains a statement of the case at pages 50-59 of the Record. In the interest of brevity the respondent will rest on that statement, merely

emphasizing a few points and calling attention to certain statements in the petition or opposing brief deemed inaccurate.

Although the petitioners brought suit below to collect legal interest on two life insurance policies issued by the respondent, only one of the petitioners was named as a beneficiary in either policy. Such rights as the petitioners have flow from a decree of the Surrogate's Court of New York County dated December 30, 1942 (R. 24-32) entered pursuant to an agreement of compromise between the petitioners who were adverse litigants in said Surrogate's Court (R. 29).

The petitioners' statement (Petition p. 2) leaves the inference that the respondent was at fault in holding back the face amount of the policies for 7 years, thus having use and benefit of the proceeds for that period. The fact is that the delay in payment was due to disputes among the petitioners themselves (R. 59) which were only resolved by said compromise agreement and the decree of December 30, 1942, with which respondent promptly complied (R. 10).

Proceedings Below

The Circuit Court of Appeals in affirming the judgment of the District Court dismissing the complaint (reported in 166 F. (2nd) 891) held, among other things, that the decree of the Surrogate's Court dated December 30, 1942, approving an agreement of compromise, between the insured's wife and children and the executors of the insured's estate, by which the proceeds of the life insurance policies, "together with all interest and post mortem dividends allowed by any insurance company", were to be paid to the petitioner bank as depositary for the

benefit of insured's wife and children was not subject to collateral attack in federal court by the wife and children and bank in seeking recovery of greater interest than was allowed by the respondent insurance company and that the petitioners, some of whom depended for their title to the proceeds of the policies on said decree, were estopped to attack it. The Court also held against the petitioners on the more basic ground that the decree was entitled to a presumption of regularity until negatived by a clear showing (absent here) of adequate grounds for collateral attack.

Questions Presented

With due respect for the petitioners' choice of language setting forth the "Questions Presented", we believe that both questions as now phrased beg the issue and we submit that the real questions before this Court are:

1. Could the Court below properly find that it affirmatively appears on the face of the complaint herein that, by reason of *res judicata* or estoppel, petitioners are entitled to no relief and that, therefore, notwithstanding Rule 8(c) of the Rules of Civil Procedure, the complaint should be dismissed under Rule 12(b)6?

2. Are the petitioners estopped from seeking relief in the federal court?

Summary of Argument

I. The complaint states facts constituting a defense against the cause of action alleged therein and is thus subject to dismissal under Rule 12(b)6.

II. The decision in the instant case is not in conflict with the decisions of the Circuit Court of Appeals for the Tenth Circuit cited in Point II of petitioners' brief.

III. The complaint was properly dismissed because

(a) The petitioners are estopped to attack the decree of the Surrogate's Court dated December 30, 1942, which negatives their claim for additional interest.

(b) The decree is entitled to a presumption of regularity and is not subject to collateral attack by the petitioners.

(c) The petitioners cannot split their single cause of action upon the policies by bringing a separate action for the interest.

(d) The petitioners' remedy if they believe that respondent has disobeyed the decree is to apply to the Surrogate's Court for relief.

B

ARGUMENT

I

The complaint states facts constituting a defense against the cause of action alleged therein and is thus subject to dismissal under Rule 12(b)6.

Where a complaint on its face shows that it is barred by an affirmative defense it is subject to a motion to dismiss under Rule 12(b)6 of the Rules of Civil Procedure and Rule 8(c) in such cases does not apply. *Berry et al.* v. *Chrysler Corp.*, 150 F. (2nd) 1002 (C.C.A. 6, 1945), (defect of bar of Statute of Limitations).

See *Continental Collieries, Inc.*, v. *Shober, Jr.*, 130 F. (2nd) 631 (C.C.A. 3, 1942), (defect of bar of Statute of Frauds).

See *Leimer* v. *State Mutual Life Assurance Co. of Worcester, Mass.*, 108 F. (2nd) 302 (C.C.A. 8, 1940), (defect of bar of Statute of Limitations).

See *Jones* v. *Miller et al.*, 2 F.R.D. 479 (D.C.W.D. Pa., 1942), (defect of bar of *res judicata*).

In the instant case it appears on the face of the complaint that the cause of action attempted to be alleged therein is barred by various affirmative defenses arising chiefly out of proceedings in the Surrogate's Court of New York County. These defenses are discussed under III of respondent's brief.

It would be a waste of time, therefore, to require the defendant to file an answer raising the defense of *res judicata,* as petitioners argue (or any other defense), and thereafter decide the issue by motion or pre-trial procedure. To do so would be to disregard the fundamental purpose of the Rules as embodied in Rule I, which reads as follows:

> "These rules * * *. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

The cases cited by petitioners in Point I of their brief are not in conflict with the decision of the Circuit Court of Appeals in the instant case. As appears from the opinion of Judge Clark the compromise agreement and the decree of December 30, 1942, provided the Court with a sufficient factual basis for the decision rendered.

II

The decision in the instant case is not in conflict with the decisions of the Circuit Court of Appeals for the Tenth Circuit cited in Point II of petitioners' brief.

An examination of the respective opinions in the cases of *Zeligson* v. *Hartman-Blair, Inc., et al.*, 135 F. (2nd) 874 (C.C.A. 10, 1943) and *Bowles* v. *Capitol Packing Co.*, 143 F. (2nd) 87 (C.C.A. 10, 1944), cited in support of petitioners' contention to the contrary, shows that in neither case did the fatal defect appear in the pleadings.

In the *Zeligson* case the prior judgment did not appear on the face of the complaint and in the *Bowles* case the Court merely held that a party may not attempt to prove estoppel at the trial when that defense has not been pleaded.

Neither decision, therefore, is in conflict with the decision in the instant case where the facts showing an estoppel were part of complaint herein.

On the contrary, the decision in *Gossard* v. *Gossard*, 149 F. (2nd) 111 (C.C.A. 10, 1945), shows that the Circuit Court of Appeals for the Tenth Circuit is in accord with the decision in the instant case. The *Gossard* case involved another affirmative defense mentioned in Rule 8(c) of the Rules of Civil Procedure, namely, the Statute of Limitations. In its opinion the Court pointed out that under Rule 9(f) allegations of time and place become material (contrary to the common law rule of immateriality) and ruled that since the complaint showed on its face that the cause of action was barred by the Statute of Limitations, the complaint was subject to dismissal under Rule 12(b)6.

III

The complaint was properly dismissed.

(a) The petitioners are estopped to attack the decree of the Surrogate's Court dated December 30, 1942, which negatives their claim for additional interest.

This decree was entered in proceedings (R. 24-28) seeking among other things the approval of a compromise agreement between the wife, the children and the executors of the insured pursuant to which the proceeds of the life policies here involved (which named the wife as beneficiary), "together with all interest and post mortem dividends allowed by any of the insurance companies" were to be paid to the petitioner bank as depositary for the benefit of the individual petitioners. The source of the title of the bank and the children thus depended upon the very decree which they attempted to attack by demanding greater amounts of interest than that allowed by the respondent. As the Court below pointed out the petitioners are estopped from doing this.

(b) The decree is entitled to a presumption of regularity and is not subject to collateral attack by the petitioners.

The petitioners attempt to avoid the effect of the decree by arguing that the Surrogate's Court had no jurisdiction to pass upon the amount of interest and, in effect, that all reference to interest in the decree is surplusage.

The Surrogate's decree was entered upon a consolidation of three different proceedings before him; namely, 1) proceeding to compel delivery of specific property, 2) judicial settlement by the Executors of their account, and 3) approval of a Compromise Agreement (R. 24-28).

The question of jurisdiction was carefully and exhaustively considered by the Court below and the force of it's decision, based on a consideration of the statutory and case law of New York, that the Surrogate's Court did have jurisdiction to, and did, pass upon the question of interest, is not overcome by the arguments of or the cases cited by the petitioner, as the Court's opinion points out.

The petitioners have ignored the New York statutes discussed in the opinion of the Court below which bear on the jurisdiction of the Surrogate's Court and rely on decisions which do not meet the factual situation in the instant case, being largely cases where jurisdiction has been declined because the question litigated was not involved in the settlement of an estate.

Petitioners also refer to the ex parte decree of December 23, 1943 (appendix B of petitioners' brief). This document, entered almost a year after the decree annexed to the complaint, was not a part of the record before either the District Court or the Circuit Court of Appeals but was dragged into the petition for rehearing to the Circuit Court of Appeals. As this decree was entered ex parte without the knowledge of respondent and the paragraphs authorizing suit against the respondent are based solely on some undisclosed statements in affidavit form made by an official of the petitioner-bank it is difficult to see how, even if it had been properly before the Courts below, the decree could have had any probative value in showing that the Surrogate's Court did not determine the amount of interest due to the petitioners or that it did not have jurisdiction to decide such issue.

(c) The petitioners cannot split their single cause of action upon the policies by bringing a separate action for the interest.

There being no provision for the payment of interest in the policies (R. 13-18), any right to interest must arise as a penalty or damages for default in payment of the face amount of the policies. In such a case the interest is regarded not as a part of the debt but as a mere incident to it and the receipt of the face amount or principal "bars a subsequent claim for the interest for the reason that in such cases interest being a mere incident, cannot exist without the debt, and the debt being extinguished the interest must necessarily be extinguished also". *Matter of Crane* v. *Craig*, 230 N. Y. 452, 461 (1921), citing *Stewart* v. *Barnes*, 153 U. S. 456 (1894).

It appears from the complaint herein (R. 8, paragraphs 29-32; R. 10, paragraphs 43-46) that the respondent paid the petitioners the face amount of both policies in suit and in addition certain additional sums for interest and dividends. In such case, in the absence of allegations negativing the effect of such payment and receipt, the petitioners are clearly within the rule of *Stewart* v. *Barnes* (*supra*) and *Matter of Crane* v. *Craig* (*supra*) and the complaint was properly dismissed. See also *Davis, Trustee,* v. *Mabee, et al.*, 32 F. (2nd) 502, 505 (C.C.A. 6, 1929); certiorari denied 280 U. S. 580 (1929).

(d) The petitioners' remedy if they believe that respondent has disobeyed the decree is to apply to the Surrogate's Court for relief.

As the opinion below points out, the petitioners' disclaimer of any reliance on the decree made it unnecessary for the Court to attempt an interpretation of the decree

beyond the points covered by the opinion (R. 59). Therefore, if the provision in the decree respecting interest means anything more than a direction to the respondent to pay the proceeds "with interest, if any" and the petitioners desire a ruling on this point, their remedy is to raise the question in the Surrogate's Court in an appropriate proceeding. Their appeal to the federal courts characterized by the Court below as "shopping for another forum" (R. 59) is clearly contrary to the policy of the State of New York of concentrating all matters affecting the settlement of decedents' estates in the Surrogate's Court.

It is respectfully submitted that the petition for certiorari should be denied.

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BRONSON GODDARD,
On the Brief.

APPENDIX

Relevant parts of certain of the rules of the Federal Rules of Civil Procedure cited in the respondent's brief are as follows:

"Rule 8. General Rules of Pleading.

(c) In pleading to a preceding pleading, a party shall set forth affirmatively * * * estoppel * * * *res judicata* * * * and any other matter constituting an avoidance or affirmative defense. * * *"

"Rule 9. Pleading Special Matters.

(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter."

"Rule 12. Defenses and Objections—
When and How Presented—
By Pleading or Motion—
Motion for Judgment on Pleadings.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, * * * shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. * * *."

Rule 12(b)6 was amended, effective March 19, 1947, by the addition of the following:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state

a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."